(1988) 08 MP CK 0026

Madhya Pradesh High Court (Indore Bench)

Case No: None

Shantilal	APPELLANT
Vs	
State of M.P.	RESPONDENT

Date of Decision: Aug. 23, 1988

Acts Referred:

- Constitution of India, 1950 - Article 13, 14, 19, 21, 22
- Criminal Procedure Code, 1973 (CrPC) - Section 2, 436, 438

Citation: (1989) CriLJ 332

Hon'ble Judges: K.L. Shrivastava, J

Bench: Single Bench

Judgement

@JUDGMENTTAG-ORDER

K.L. Shrivastava, J.
This is an application u/s 438 of the Criminal P.C. 1973 (for short "the Code") for grant of anticipatory bail.

2. Submission of the learned Counsel for the petitioner is that the petitioner reasonably apprehends his arrest in connection with Crime No. 98/88 of P.S. Petlawad relating to an offence u/s 49A of the Madhya Pradesh Excise Act, 1915 (for short "the Act") and he deserves to be enlarged on anticipatory bail.

3. The learned Counsel appearing for the prosecution opposes the petitioner"s application. He contends that u/s 59 of the Act all offences punishable thereunder are bailable within the meaning of the Code and the applicability of the provision u/s 438 of the Code for grant of anticipatory bail is attracted only in cases on non-bailable offences. It is next contended that in view of the provision in Section 49-B(i) of the Act, application for grant of anticipatory bail cannot be entertained at all. It is further urged that in addition to the provision there is the prosecution"s opposition to the petitioner"s prayer for bail and this, under law, is conclusive on the

question of grant of bail.

4. The point for consideration is whether the prayer for grant of bail should be allowed.

5. I shall first take up the contention regarding the in applicability of Section 438 of the Code on the footing that the offence in question is bailable.

6. It is clear from a perusal of Section 438 of the Code that it is available to a person having reason to believe that he may be arrested on an accusation of having committed a non-bailable offence.

7. Section 2(a) of the Code defines bailable offence as under:

In this Code, unless the context otherwise requires -

(a) ''bailable offence'' means an offence which is shown as bailable in the First Schedule, or which is made bailable by any other law for the time being in force; and ''non-bailable offence'' means any other offence.

As the definition points out, the context has its own importance.

8. In order to find out whether a particular I.P.C. Offence is bailable or non-bailable, reference has to be made to Column 5 of 1st Schedule to the Code. In regard to offence, against other laws, reference in this connection has to be made to the II Schedule to the Code. Where, however, the statute itself provides separately as to the offence being bailable or non-bailable that provision must prevail.

9. An offence being non-bailable does not mean that bail can in no case be granted A perusal of Section 436 of the Code reveals that person accused of a bailable offence is entitle to bail as of right. However, where a person if accused of a non-bailable offence, it is not so All that ''non-bailable'' implies is that unlike the person accused of a bailable offence person accused of non-bailable offence cannot claim bail as of right and the question of grant of bail to such a person is left by the legislature in the court''s discretion to be exercised on a consideration of the totality of the facts and circumstances of a given case, The discretion has, of course, to be a judicial one informed by tradition methodized by analogy, disciplined by system and subordinated to the primordial necessity of order in social life.

10. It is true that u/s 59 of the Act all offences under the Act have been made bailable but Section 49B strikes a discordant note. It is in these words:

Section 49-B. Bail not to be allowed for offences under this Chapter - Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (No. 2 of 1974) or Section 59 -

(i) no application for an anticipatory bail shall be entertained by any court in respect of a person accused of an offence u/s 49A;

(ii) no application for bail of a person accused of an offence u/s 49A shall be allowed if opposed by the prosecution;

Provided that no court or Magistrate shall authorise detention of such person in custody during the course of investigation for a period exceeding one hundered and twenty days and on the expiry of such period, in the event, of the report or complaint not being filed, the accused shall be released forthwith if he is prepared to and does furnish bail.

11. From a plain perusal of the provision in Section 49B of the Act extracted above it is clear that in relation to an offence u/s 49A of the Act, leaving the case covered by the proviso the accused is not entitled to bail as of right and construed in the context of this provision the offence u/s 49A is clearly not bailable one. Therefore, the case attracts the applicability of the provision in Section 438 of the Code.

12. Now I take up the other contention that in view of the provision embodied in Section 49-B of the Act, bail cannot, under law, be granted to the petitioner. According to the learned Counsel Section 49B (i) of the Act expressly negatives any right to apply for anticipatory bail when the person is accused of an offence u/s 49A ibid and then Section 49B(ii) provides that opposition by the prosecution to the prayer for bail is conclusive against him.

13. The contention of the learned Counsel for the petitioner is that the petitioner''s fundamental right to personal liberty under Article 21 of the Constitution of India cannot be curtailed and he must be held entitled to apply for anticipatory bail. In support of this submission reliance has been placed on the decisions in Sheikh Salim''s case 1985 MPLJ 65 : 1985 C Cri J 306 and Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, .

14. It is well-settled that pre-trial detention is not to be resorted to as a measure of punishment. The mere fact that the case prima facie involves a serious crime is not by itself conclusive. The citizen''s claim to the fundamental right of personal liberty under the Constitution of India has to be subordinated only to the demands of public justice which must reign supreme as all laws have dispensation of justice as the end in view. Chapter III (Arts. 12 to 53) of the Constitution deals with Fundamental Rights. Article 21 guaranting the right of personal liberty runs thus:

No person shall be deprived of his life or personal liberty except according to procedure established by law.

Article 13(3)(a) of the Constitution defines ''law'' in these terms:

In this Article, unless the context otherwise requires-(a) "Law" includes any ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law.

In the decision in Bijoe Emmanuel and Others Vs. State of Kerala and Others, it has been pointed out that right to speedy trial is a fundamental right implicit in Article 21.

15. In the decision in Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, it has been pointed out that right to personal liberty guaranteed by Article 21 can only be abridged by law which satisfies the test of reasonableness. According to the decision a law depriving a person of his personal liberty prescribing a procedure for that purpose with in the meaning of Article 21 has to stand the test of one or more of the fundamental rights conferred in a given situation, ex hypothesi it must also stand the test of reasonableness contemplated in Article 14 as principle of reasonableness is an essential element of ''equality'' or ''non-arbitrariness which it guarantees. As pointed out in Union of India and Another Vs. Tulsiram Patel and Others, guarantee of equality is a dynamic concept. According to the decision in Maneka Gandhi''s case (supra) ''procedure'' in Article 21 means fair procedure, not formal procedure and the ''law'' referred to in it is reasonable law, not any enacted legislation. As observed in the decision procedure contemplated under Article 21 must be "right and just and fair and not arbitrary, fanciful or oppressive otherwise it could fall foul of Article 21.

16. As pointed out in Tulsiram''s case (supra) by process of judicial interpretation two rules have been evolved as representing the principles of natural justice. The first rule is memo index in cause sua, that is "no man ought to be judge in his own case". The second rule is audi alteram partem, that is "hear the other side", Violation of rules of natural justice results in arbitrariness which is the same thing as discrimination. Thus to treat a person in violation of the principles of natural justice would amount to arbitrary and discriminatory treatment and would violate the guarantee given by Article 14. In the decision in Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, it has been pointed out that where the legislature omits provision for hearing justice of common law will supply the omission of the legislature.

17. Right of hearing constitutes the essence of justice and its corollary is that justice should not only be done but should) manifestly be seen to be done.

18. In the decision in Sheikh Salim''s case 1985 MPLJ 65 (supra) it has been observed under:

Any statutory provision curtailing the liberty of a citizen is to be strictly construed. Thus, when bail is refused a man is deprived of his personal liberty, which is too precious in value, has been recognized in our constitutional system by Articles 19, 21 and 22 of the Constitution of India. The significance and sweep of Article 21 of the Constitution of India is deep and wide enough to cover the question of bail.

19. In para 9 of the decision in Sheikh Salim''s case 1985 MPLJ 65 (supra) referring to the rules of natural justice it has been observed as under:

On these principles it is open to the court to question the opposition offered by the prosecution whether the opposition offered by the prosecution is just, fair and reasonable. Even where there is no provision for bail the Supreme Court has upheld the right of a citizen being enlarged on bail even in cases of preventive detention pending in habeas corpus petitions. See; The State of Bihar Vs. Rambalak Singh and Others, .

In connection with the right to bail reference may also be made to the decision in State of Uttar Pradesh Vs. Jairam and Others, , State of Rajasthan, Jaipur Vs. Balchand alias Baliay, and Balchand v. State of M.P. AIR 1977 SC 366 : 1977 Cri LJ 225.

20. The decision in Olga Tellis and Others Vs. Bombay Municipal Corporation and Others, highlights the import and the importance of the rule of natural justice as to the right of hearing. Reference in this connection may also be usefully made to the decisions in Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, and O.P. Bhandari Vs. Indian Tourism Development Corpn. Ltd. and Others, .

21. However, it is equally well-settled that the applicability of the rule may be excluded by the legislature either expressly or by necessary implication in order to meet a particular contingency. As is clear from the decision in Union of India and Another Vs. Tulsiram Patel and Others, the application of the rules of natural justice may be excluded and being flexible they may be modified in their application in order to meet the justice of the individual case. The decisions in Olga Tellis and Others Vs. Bombay Municipal Corporation and Others, and R.S. Dass Ors. Vs. Union of India (UOI) and Others, are also pertinent on this point. It must be remembered that unnatural expansion of rules of natural justice, without reference to the administrative realities and other facts of a given case can be exasperating.

22. As observed in para 98 of the decision in Tulsiram''s case (supra) it is with reference to the facts and circumstances of a given case that the question of applicability of the principles of natural justice being attracted and the subsequent question whether their requirements have been met by the procedure adopted, have to be determined. Therein it has been further observed that whenever a complaint is made before a court that some principles of natural justice have been contravened, the court has to decide whether observance of that rule was necessary for a just decision of that case. According to the decision in Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, where the question relates to the violation of audi alteram partem rule, the inquiry must always be does fairness demand that an opportunity to be heard should be given to the affected person? With reference to Article 311(2) second proviso and Article 14 it has been pointed out in the decision in Turlsiram''s case (supra) that opportunity of hearing is wholly ruled out under the second proviso and it cannot be introduced by reference to Article 14 and that the remedy of the servant is that of judicial review. It was pointed out that the proviso has been inserted as a matter of public policy and in public interest and for public

good.

23. It may be pointed out that it is by Section 9 of the Amending Act of 1982 (No. 39 of 1982) that new Chap. VII-A has been added after Chap. VII, as it existed in the Act and has the caption "Offences and Penalties''. Sections 34, 35 and 36 were already there but in order to meet the new menace created by illicit liquor sale and its consumption endangering human life, the new Chap. VII-A under the caption ''Penalty for offence against life'' has been added incorporating Sections 49-A and 49-B therein. It is in the aforesaid context that the provision in Section 49-B(i) of the Act has to be construed.

24. Bail pre-supposes some restraint. Section 438 of the Code provides for what is commonly known as anticipatory bail. It is granted in anticipation of arrest and becomes operative the moment arrest is effected. The wide amplitude of the court''s discretion under the provision has been clearly brought out in the decision in K.K. Jagodiya v. State (1988) I Cri 177 : 1988 Cri LJ 968 (Delhi) with the aid of relevant excerpts from the decision in Shri Gurbaksh Singh Sibbia and Others Vs. State of Punjab, .

25. In dealing with the question of anticipatory bail it has also to be borne in mind that if granted it deprives the investigating agency of its right to interrogate the offender in custody and the magistracy of its discretion to grant police remand.

26. Till a person is arrested there is no question of deprivation of his personal liberty and the question of ''law and before arrest, procedure'' measuring up to the tests laid down in Maneka Gandhi''s case may not arise. That question would properly arise when the person is arrested and stands deprived of his personal liberty. The Full Bench decision in Gulabchand v. State of M.P. relates to Dakaiti Prabhavit Kshetra Adhyadesh 1981 (M.P.). The decision with reference to the relevant provision of the Code regarding the right of the accused to apply for bail at different stages lays down as under:

Putting it differently a person arrested for dacoity or a specified offence under the Ordinance can apply for bail in spite of Section 5(2) at the stage immediately after his arrest on the ground that there was no reasonable suspicion of his being concerned in such offence; at the stage after twenty-four hours of his arrest and during investigation on the ground that there are no grounds that the accusation or information against him is well founded; and at the stage after the investigation is complete on the ground that there is no sufficient evidence or prima facie proof against him in support of the accusation. We may add that bail has also to be granted, as pointed out later in this judgment, when the investigation is not complete within 120 days from the date of arrest under the proviso to Section 5(2).

In the decision in State of M.P. v. Dalipa 1986 Cur Cri J 66 (Madh Pra) with reference to Article 21 of the Constitution it has been observed thus:

This Article clarifies and crystalises a general principle. Even if an accused is sent to jail, the courts are to ensure that deprivation of liberty is accompanied by curative stretch and human dignity. Article 21 is, thus, the jurisdictional route for this legal liberalism.

The ratio of the decision in Sheikh Salim''s case 1985 MPLJ 65 (supra) is applicable only in the case of a person in detention. The claim to be heard before arrest is effected stands expressly excluded by the legislature by the provision in Section 49-B (i) of the Act to meet the particular contingency and the provision has, therefore, to be given effect to by the Courts.

27. As a result of the foregoing discussion I find that the application for grant on anticipatory bail cannot be entertained and is, consequently, rejected.